

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Malkhan Miller, :
Appellant-Appellant, :
v. : No. 08AP-1082
(C.P.C. No. 07CVF12-17527)
Columbus City Public Schools et al., : (ACCELERATED CALENDAR)
Appellees-Appellees. :

D E C I S I O N

Rendered on June 11, 2009

The Isaac Firm, L.L.C., and Kendall D. Isaac, for appellant.

Loren L. Braverman, for appellee Columbus City Public Schools.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, Malkhan Miller, appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of the Columbus Civil Service Commission ("commission") that affirmed the decision of appellee, Columbus City Public Schools, to terminate appellant from his position as custodian at Highland Elementary School ("Highland"). Because the common pleas court did not abuse its discretion (1) in concluding the record contains reliable, substantial, and probative evidence to support the school's decision to terminate appellant's employment, and (2) in refusing to substitute its

judgment for that of the commission in assessing the credibility of appellant and Tamara Jackson, we affirm.

I. Procedural History and Facts

{¶2} The Columbus City Public Schools employed appellant as a custodian for eleven and one-half years. On February 15, 2007, appellant was a custodian at Highland where Jane Leach, a principal in the district for 13 years, had been the principal for five years.

{¶3} As principal at Highland, Leach was responsible not only for the students' safety and well-being but also for the instructional practices at the school. She thus was in charge of teaching and learning, as well as building operations. Consistent with those responsibilities, Leach's mission was to make Highland a place of peace where everyone learned. Three rules governed conduct at Highland: "[T]ake care of yourself, take care of others, and take care of this place." (Tr. 16.) All at Highland were expected to model that behavior, including the non-teaching staff. Among Leach's instructional responsibilities was teacher evaluation in the classroom. Leach made clear she was not to be interrupted during the process absent something very important. (Tr. 9.)

{¶4} On the morning of February 15, 2007, at about 10:30 a.m., Jeanne Cain, secretary to the head secretary and an employee at Highland for seven years, was checking delivered boxes so the items in them could be distributed throughout the building to their appropriate places. As she did so, she "overheard Mal[khan Miller] shouting at Tamara [Jackson], telling her she was immature." (Tr. 8.) Appellant was loud enough for Cain to hear him in the hallway and to interrupt her work. Noting children were in the gymnasium, Cain "didn't think that could go on in a place of business, especially

with children in the gym * * * [b]ecause it wasn't proper conduct." (Tr. 8.) Even though Cain knew Leach's policy against interruptions during teacher evaluations, Cain went to the room where Leach was observing, interrupted Leach, and told her that "she needed to come down and, and get Mal out of the building." (Tr. 9.)

{¶5} When Leach arrived, appellant was standing in the kitchen area with Tamara Jackson, a food service worker at the school; doors connected the gymnasium and kitchen. Jackson was on the phone with police because, as she told Leach, "Mal had * * * snatched, the glasses off [Jackson's] face and had thrown them in the kitchen[.]" (Tr. 22.) Jackson told Leach, "[Y]ou need to get him out of here." (Tr. 22.) Leach advised appellant he needed to leave, and appellant said he was just about to do that; he walked out of the building through the closest door. Jackson hung up the telephone, but police called her back because she had hung up on a 9-1-1 call.

{¶6} Shortly after that conversation, Jackson wrote a statement stating appellant came into the kitchen to ask about money she owed him. When she did not say what he wanted to hear, his voice "got louder and louder." (Statement, 1.) Although she asked him a few times to lower his voice because they were in a school and the children were in the gymnasium, he "continued and it got worse." (Statement, 1.) When he was unable to contact her bank, "his attitude kept getting worse. So he grabbed [her] glasses off [her] face and threw them and walked away." (Statement, 1.) As Leach walked in, Jackson told her that she needed to get appellant out of there. She explained that she "called the police to report what happened because it was getting crazy." (Statement, 2.) Police arrived, and she gave them and appellant's "boss" the details of what happened.

{¶7} Following an investigation, appellant was given a notice dated February 19, 2007, which, by his signature, he acknowledged receiving the following day. The notice advised appellant he had engaged in neglect of duty, misfeasance, malfeasance, and/or nonfeasance. More specifically, the notice informed appellant he was charged with destruction of personal property, assault, disorderly conduct, demanding money from a school employee, display of aggressive physical behavior, and exhibiting inappropriate language. A hearing was scheduled for February 26, 2007 in the office of Jerry McAfee. After the hearing ("McAfee hearing"), appellant was notified on March 8, 2007 that, as a result of the February 15, 2007 incident, he was discharged from his position as custodian. Appellant appealed to the commission.

{¶8} On October 24, 2007, the trial board of the commission held a hearing on the merits of appellant's appeal. Following the hearing, the trial board issued a report and recommendation, noting the evidence presented, setting forth its findings, and recommending that the commission affirm the decision to discharge appellant from his position as custodian. The commission, at its regular meeting on November 26, 2007, adopted the trial board's recommendation and affirmed the action discharging appellant.

{¶9} Appellant appealed the commission's decision to the common pleas court pursuant to R.C. 119.12. After the parties briefed the issues, the court issued a "Judgment Entry and Final Appealable Order Affirming the Decision of the Columbus Civil Service Commission." Appellant appeals, assigning two errors:

1. Judge erred in finding that there was just cause for Appellant's termination[.]

2. Judge erred in not giving substantial weight to the testimony of Mr. McAfee and Ms. Jackson at the Commission hearing[.]

II. Applicable Standards

{¶10} According to R.C. 119.12, the common pleas court may affirm the commission's decision if, upon consideration of the entire record and any additional evidence the court admits, the court finds not only that reliable, probative, and substantial evidence supports the commission's decision, but also that the decision is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11; *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280; *Gallagher v. Ross Cty. Sheriff*, 10th Dist. No. 06AP-942, 2007-Ohio-847, ¶13.

{¶11} The determination of whether reliable, probative, and substantial evidence supports the commission's decision is primarily a question of the absence or presence of the requisite quantum of evidence. *Beeler v. Franklin Cty. Sheriff* (1990), 67 Ohio App.3d 748, 753, citing *Andrews*. If the common pleas court finds after its appraisal of all the evidence that reliable, probative, and substantial evidence does not support the commission's decision, or the decision is not in accordance with law, the court may reverse, vacate or modify the commission's decision. R.C. 119.12; *Conrad* at 110; *Andrews*, paragraph one of the syllabus. Where the evidence supports the commission's decision, the common pleas court must affirm the commission's decision and has no authority to modify the penalty. *State ex rel. Ogan v. Teater* (1978), 54 Ohio St.2d 235, 246-47; *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233; *Ohio State Univ. v. Kyle*, 10th Dist. No. 06AP-168, 2006-Ohio-5517, ¶27. Under such circumstances, the common pleas court may not substitute its judgment for that of the commission. *Id.*,

citing *Steinbacher v. Louis* (1987), 36 Ohio App.3d 68, 71, citing *Ogan, supra*; *Traub v. Warren Cty. Bd. of Commrs.* (1996), 114 Ohio App.3d 486, 491.

III. First Assignment of Error

{¶12} In his first assignment of error, appellant essentially advances the same arguments he offered to the commission and the common pleas court: he disputes the factual predicate for the commission's decision. While appellant acknowledges he typically worked from 3:00 p.m. to 11:00 p.m., he notes that, contrary to evidence suggesting he was not authorized to be at Highland on the morning of the incident, he was filling in for another custodian who was recovering from surgery. Moreover, he observes, his disagreement with Jackson did not arise out of a pointless discussion. Rather, Jackson was his ex-girlfriend and is the mother of his child; the discussion involved money she owed him. Insofar as appellant was charged with inappropriate language, appellant points out he and Jackson were the only witnesses to the entire argument, and the testimony of neither supports such a charge. As proof that his contentions have merit, appellant argues McAfee conceded at the hearing before the commission's trial board that appellant was terminated without just cause.

{¶13} Contrary to appellant's contentions, the transcript of the evidence before the trial board includes substantial, reliable, and probative evidence to support the commission's decision, and the common pleas court did not abuse its discretion in so concluding.

{¶14} Without question, an argument of some sort occurred between appellant and Jackson, and it was sufficiently loud to gain Cain's attention. Cain, in turn, was concerned enough to interrupt Leach, knowing such interruptions were to occur only as

an exception. Further supporting the aggravated nature of the argument between Jackson and appellant, Jackson, in the course of her discussion with the 9-1-1 operator, advised that appellant took the glasses off of her face and threw them. While her testimony at the trial board's hearing suggested otherwise, the commission rightly could conclude that, in light of her statement to the 9-1-1 operator and her written statement following the incident, "something occurred with her glasses." (Trial Board Report and Recommendation, 10.)

{¶15} Moreover, in light of Leach's testimony concerning the mission of the school, the commission had ample evidence that the conduct between appellant and Jackson was inappropriate inside Highland, especially in such close proximity to the children in the gymnasium. As the commission's trial board concluded, "Both the argument and the police being called to the school detracted from this mission." (Report and Recommendation, 10.)

{¶16} Finally, the trial board noted appellant's history of disciplinary action. According to the evidence, appellant was given a written reprimand in December 2002 and in October 2006; he was suspended for five days in April 2003 and again in July 2003. In addition, appellant previously was terminated from his employment as a custodian, but, through an appeal, was able to reduce the termination to a 30-day suspension. While appellant contends the prior disciplinary actions have little relevance to the present matter since they arose out of attendance issues, the commission nonetheless could consider his disciplinary history in determining whether the action taken in response to the February 2007 incident was justifiable.

{¶17} Despite the evidence, appellant contends McAfee, at the trial board's hearing, conceded appellant's termination was inappropriate. McAfee's statement in response to appellant's question was based on facts appellant specified to McAfee and required McAfee to employ in his answer. Following McAfee's "concession," redirect examination clarified that McAfee disagreed with appellant's factual predicate and, based on the evidence, believed termination was appropriate.

{¶18} Appellant also contends he was denied the opportunity to call Jackson as a witness at the McAfee hearing. While both appellant and Jackson suggested at the trial board's hearing that Jackson was denied entrance to the McAfee hearing, theirs was not the only testimony to address the issue. At the trial board's hearing, McAfee explained the procedure he followed at the hearing he conducted, stating the investigator presented his findings, including statements from Jackson and the head custodian. Additional evidence was presented concerning appellant's work schedule. Appellant and his union representative then had an opportunity to present appellant's evidence.

{¶19} McAfee testified that when appellant raised the issue of Jackson's presence inside the hearing room, McAfee did not prohibit Jackson from entering the room. Rather, after some conversation about the issue, McAfee "cautioned Mr. Miller about that; what it would mean to bring her in the room." (Tr. 59.) Although appellant offered to step outside while Jackson spoke, McAfee advised that appellant needed to hear all statements. After McAfee informed appellant that Jackson's presence likely would prompt questions to her, appellant turned to his union representative to ask his advice. The union representative "said something to the effect I wouldn't, something to that fact. Mr. Miller then turned and said well my union's told me not to, I'm not going to bring her in, something, that was the

exchange." (Tr. 59-60.) Given McAfee's testimony, the commission could find appellant's contention unpersuasive.

{¶20} Finally, even had McAfee precluded appellant from bringing Jackson into the hearing room, we are hard-pressed to find prejudice to appellant. No transcript of the McAfee hearing was included in the record, so the commission, the common pleas court or this court would not be able to consider any testimony Jackson might have offered at that hearing. Perhaps more significant, the commission's trial board conducted a de novo hearing, and Jackson testified there. As a result, appellant had the opportunity to present Jackson's testimony to a hearing board that considered her testimony without deference to the results of the McAfee hearing. Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶21} Appellant's second assignment of error asserts the common pleas court abused its discretion in failing to conclude the commission wrongly assessed the credibility of both McAfee and Jackson. Appellant contends, as he did in his first assignment of error, the commission should have accepted McAfee's "concession" that appellant was improperly discharged from employment. Appellant further notes that Jackson's second statement, as well as her testimony before the commission's trial board, retracted many of the most egregious aspects of her initial statement and call to police.

{¶22} For the reasons set forth in resolving appellant's first assignment of error, his contentions regarding the commission's assessment of McAfee's credibility are unpersuasive. McAfee clarified that his testimony regarding appellant's improper discharge from employment was premised on facts appellant supplied in his question.

Redirect examination demonstrated McAfee disagreed with appellant's factual premise and, based on the evidence, confirmed McAfee's opinion that appellant's termination from employment was appropriate.

{¶23} Although appellant also contends the commission erred in assessing Jackson's credibility, Jackson's circumstances presented a basis for the commission to find her modified version of the incident not to be credible. At the time of the incident, and aware that 9-1-1 was to be used for emergencies, Jackson called 9-1-1 and sought police assistance to have appellant removed from her presence. Moreover, shortly after the incident she prepared a statement largely consistent with her conversation with the 9-1-1 operator. She modified her testimony at the trial board's hearing.

{¶24} Between the incident and the trial board's hearing, appellant was discharged from his employment. During the time appellant was employed at Highland, he made child support payments to Jackson, not through the courts but on his own. Once he was discharged from his custodial position, he ceased making payments. The commission reasonably could conclude that appellant's inability to pay child support prompted Jackson to vary from her initial statement.

{¶25} Finally, to the extent appellant's second assignment of error challenges the commission's assessment of his own credibility, the commission's trial board specifically concluded it "did not find Mr. Miller's testimony to be particularly credible, in that his testimony differed significantly from the other witnesses' testimony and his contention that he never received. His [sic] notice of hearing proved to be false." (Report and Recommendation, 10.) The record allows the trial board to reach that conclusion.

{¶26} As suggested in the trial board's report and recommendation, appellant at the hearing before the trial board stated he never received notice in writing of the McAfee hearing. He explained the notice was sent to the wrong address and he thus never received the written notification. On cross-examination, the school presented a written document bearing appellant's signature through which he acknowledged receipt of the written notification advising him of the hearing date and time. While appellant attempted to explain the discrepancy, the trial board was not required to find his explanation credible.

{¶27} Moreover, appellant disagreed with virtually all the significant evidence presented at the hearing. He denied grabbing Jackson's glasses, he denied his voice was loud enough to carry into the hallway where Cain could hear it, he denied Leach told him to leave the building, and he asserted everyone who reported on the incident was lying.

{¶28} Finally, appellant's general view of the disciplinary process allowed the board to conclude his perception skewed his view of the incident at issue. Appellant tended to see the disciplinary process as a reflection that others did not like him. He claimed neither the investigator responsible for checking into the February 2007 incident nor Leach liked him. He also asserted his termination from employment was in retaliation for conversion of his prior termination to a suspension. He acknowledged, however, that Leach was not involved in the discipline that led to his 30-day suspension.

{¶29} In the final analysis, the commission was charged with assessing the credibility of the witnesses, and we cannot say the common pleas court abused its discretion in concluding the commission reasonably exercised its responsibility to assess the witnesses' credibility on the evidence presented to it. *Conrad*, supra (requiring courts

to defer to administrative agency's resolution of evidentiary conflicts). Appellant's contentions to the contrary are unpersuasive. Appellant's second assignment of error is overruled.

{¶30} Because the common pleas court did not abuse its discretion in concluding substantial, reliable, and probative evidence supports the commission's decision upholding appellant's discharge from employment, we overrule both of appellant's assignments of error and affirm the judgment of the common pleas court.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
